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5 UNITED STATES DISTRICT COURT
6 WESTERN DISTRICT OF WASHINGTON
7 AT TACOMA

8 UNITED STATES OF AMERICA,

CASE NO. CR06-5504 BHS

9 Plaintiff,

ORDER GRANTING DEFENDANT
COMPASSIONATE RELEASE

v.

10 CHARLES NOLON BUSH,

11 Defendant.

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13 This matter comes before the Court on Defendant Charles Bush's motion for
14 compassionate release. Dkt. 138. The Court has considered the pleadings filed in support
15 of and in opposition to the motion and the remainder of the file and hereby grants the
16 motion for the reasons stated herein.

17 **I. FACTUAL & PROCEDURAL BACKGROUND**

18 Bush moved for compassionate release on September 16, 2020, Dkt. 138, arguing
19 that he is entitled to compassionate release because the COVID-19 pandemic presents an
20 extraordinary and compelling reason or, in the alternative, because he is experiencing "a
21 serious deterioration in physical or mental health because of the aging process," U.S.S.G.
22 § 1B1.13, Application Note 1(b). The Court denied Bush's motion on the grounds of

1 COVID-19 as Bush tested positive for COVID-19 in May 2020 but requested
2 supplemental briefing on the issue of Application Note 1(b) and whether Bush is
3 experiencing a serious deterioration because of the aging process, warranting
4 compassionate release. Dkt. 156.

5 On November 9, 2020, Bush filed his supplemental briefing, Dkt. 157, and on
6 November 16, 2020, he filed the declaration of Dr. Laurel Coleman, an expert physician
7 who provided a medical evaluation of Bush, Dkt. 158. On November 16, 2020, the
8 Government responded. Dkt. 159. On November 18, 2020, Bush replied. Dkt. 160.

9 II. DISCUSSION

10 Pursuant to 18 U.S.C. § 3582(b), a judgment of conviction that includes a sentence
11 of imprisonment “constitutes a final judgment and may not be modified by a district court
12 except in limited circumstances.” *Dillon v. United States*, 560 U.S. 817, 824 (2010)
13 (internal quotations omitted). Those limited circumstances are provided under 18 U.S.C.
14 § 3582(c)(1)(A)(i). Effective December 21, 2018, the First Step Act of 2018 amended
15 § 3582(c)(1)(A) by adding a provision that allows prisoners to directly petition a district
16 court for compassionate release. 18 U.S.C. § 3582(c)(1)(A). Accordingly, a court may
17 reduce a sentence upon motion of a defendant provided that: (1) the inmate has either
18 exhausted his or her administrative appeal rights of the Bureau of Prison’s (“BOP”)
19 failure to bring such a motion on the inmate’s behalf or has waited until 30 days after the
20 applicable warden has received such a request; (2) the inmate has established
21 “extraordinary and compelling reasons” for the requested sentence reduction; and (3) the
22 reduction is consistent with the Sentencing Commission’s policy statement. *See id.*

1 The Sentencing Commission’s policy statement referenced in 18 U.S.C.
 2 § 3582(c)(1)(A)(i) provides, in relevant part:

3 [T]he court may reduce a term of imprisonment (and may impose a
 4 term of supervised release with or without conditions that does not exceed
 5 the unserved portion of the original term of imprisonment) if, after
 6 considering the factors set forth in 18 U.S.C. § 3553(a), to the extent that
 7 they are applicable, the court determines that—

(1)(A) Extraordinary and compelling reasons warrant the reduction;

(2) The defendant is not a danger to the safety of any other person or
 to the community, as provided in 18 U.S.C. § 3142(g); and

(3) The reduction is consistent with this policy statement.

8 United States Sentencing Guidelines (“U.S.S.G.”) § 1B1.13.

9 **A. Extraordinary and Compelling Reasons**

10 The First Step Act allows for the finding for extraordinary and compelling reasons
 11 warranting compassionate release if a defendant presents evidence that, *inter alia*, the
 12 defendant is at least 65 years old, is experiencing a serious deterioration in health due to
 13 the aging process, and has served at least 10 years or 75% of his or her term of
 14 imprisonment, whichever is less. *See* U.S.S.G. §1B1.13, Application Note 1. Here, Bush
 15 easily satisfies two of Application Note 1(b)’s requirements: he is 81 years old and has
 16 served at least 10 years of his sentence. Whether Bush has an extraordinary and
 17 compelling reason to warrant compassionate release ultimately hinges on if he is
 18 experiencing serious deterioration in his health because of the aging process.

19 Whether Bush is experiencing such deterioration due to his age is “a fact-intensive
 20 analysis[,]” but Bush “need not have lost all ability to provide self-care or be suffering
 21 from a terminal illness to qualify for relief[.]” *United States v. Ebbers*, 432 F. Supp. 3d
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421, 428 (S.D.N.Y. Jan. 8, 2020). Application Note 1(b) “applies to senior-citizen defendants who have already spent over ten years in prison and whose physical and cognitive deterioration has impaired basic human functions without regard to whether their conditions, other than aging, are terminal.” *Id.* at 428. In cases where the court has found serious deterioration in health because of the aging process, the defendant had documented, serious medical conditions that were uncontrolled and diminished the defendant’s ability to provide self-care. *See, e.g., id.* at 431–32 (granting relief for 78-year-old who was experiencing a rapid decline in his health due to aging); *United States v. Bellamy*, No. 15-165(8) (JRT/LIB), 2019 WL 3340699, at *3 (D. Min. July 25, 2019) (granting compassionate release to 71-year-old wheelchair-bound defendant who had heart problems, and suffered from diabetic kidney disease, among other conditions); *United States v. Johns*, No. CR 91-392-TUC-CKJ, 2019 WL 2646663, at *2 (D. Ariz. June 27, 2019) (granting compassionate release to 81-year-old suffering from severe heart disease); *United States v. McGraw*, No. 2:02-cr-00018-LJM-CMM, 2019 WL 2059488, at *1–2 (S.D. Ind. May 9, 2019) (granting compassionate release to 72-year-old inmate with limited mobility, diabetes, kidney disease, Hepatitis C, and other issues).

When a court finds extraordinary and compelling reasons pursuant to Application Note 1(b), the defendant’s medical conditions range from the most severe to those that are “chronic.” *Compare Ebberts*, 432 F. Supp. 3d at 432 (finding the defendant’s “ability to care for himself [] nearly gone, his cognitive functions [] impaired, and his body [] wasting away.”) *with United States v. Young*, 458 F. Supp. 3d. 838, 848 (M.D. Tenn. March 4, 2020) (concluding that the defendant’s “physical health, although perhaps not

1 seriously deteriorating, is nonetheless declining due to chronic illnesses and the aging
2 process.”). And some courts have considered whether the defendant’s medical conditions
3 demonstrate “a *substantially* diminished ability to provide self-care.” *McGraw*, 2019 WL
4 2059488, at *4 (emphasis added); *see also Ebbers*, 432 F. Supp. 3d at 428 and n.7 (“A
5 defendant’s ability to provide self-care in prison is, nevertheless, one factor a court may
6 consider, just not a required factor.”).

7 Bush’s medical records reflect that he is currently suffering from uncontrolled
8 hypertension and stage 3 kidney disease, *see* Sealed Dkt. 139; moreover, Bush provides
9 evidence of macular degeneration. He argues that each of these health conditions is a
10 product of the aging process and, when viewed collectively, that the conditions present a
11 serious deterioration of his health. Bush also provides the declaration of Dr. Coleman to
12 support his argument that he is suffering from serious deterioration. *See* Dkt. 158. Dr.
13 Coleman is an internist, geriatrician, and palliative care physician who reviewed Bush’s
14 BOP medical records and a transcript of a phone call with Bush and his attorney related
15 to specific questions about his current functional status to prepare her declaration. *Id.*,
16 Exhibit B, Medical Evaluation for Charles Nolan Bush. Dr. Coleman identified six active
17 medical problems for Bush: chronic kidney disease, hypertension, coronary artery
18 disease, prostate enlargement, dental concerns, and chronic obstructive lung disease.¹ Dr.
19 Coleman also identified that Bush reports increasing pain, which has limited his ability to
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21 ¹ Dr. Coleman also identifies Bush’s previous COVID-19 infection as a current medical
22 condition, but for the reasons stated in the underlying order, the Court will not consider whether
Bush’s previous COVID-19 infection contributes to his deterioration.

1 move freely, has had trouble finding foods to eat due to his lack of teeth, and reports
2 declining short-term and long-term memory. Dr. Coleman concluded that “While there is
3 not ‘one’ condition that specifically impacts his prognosis or likelihood of death in the
4 next six months, they all combine to increase his need to intermittent hospitalization, and
5 more support care for his function decline.” *Id.* at 11 (emphasis in original).

6 The parties agree that Bush’s medical records reflect that Bush has uncontrolled
7 high blood pressure, stage 3 kidney disease, early onset macular degeneration, and
8 periodontal disease, but the Government argues that these conditions are “ordinary
9 geriatric ailments” and do not currently rise to the level of deterioration contemplated by
10 Application Note 1(b). *See* Dkt. 159 at 4. In cases where a court has found a defendant to
11 have “ordinary geriatric ailments” and not extraordinary and compelling reasons, the
12 defendant had common, non-life-threatening ailments, such as using a cane or having
13 back pain or vision problems. *See, e.g., United States v. Brown*, No. 1:04-cr-00006, 2020
14 WL 3035916, at *3 (M.D. Tenn. June 4, 2020) (finding “ordinary geriatric ailments” for
15 67-year-old who sometimes required a cane to walk and had single eye blindness);
16 *United States v. Estrella*, No. 2:15-cr-00032-GZS, 2019 WL 6689897, at *1 (D. Me. Dec.
17 6, 2019) (denying relief to 69-year-old with limited mobility who required the use of a
18 cane); *United States v. Gross*, No. 2:04-CR-32-RMP, 2019 WL 2437463, at *1, *3 (E.D.
19 Wash. June 11, 2019) (65-year-old defendant legally blind in one eye did not qualify as
20 having age-based deterioration). But in *Brown*, for example, the court did not consider
21 the defendant’s other, serious medical conditions, such as cutaneous T-cell lymphoma
22 and high blood pressure, when examining whether there were extraordinary and

1 compelling reasons because the defendant's conditions were being successfully treated or
2 well controlled with medication. 2020 WL 3035916, at *3.

3 The Court agrees with Bush that his health, when considering all of his medical
4 conditions, is in serious decline because of the aging process. Though Bush's health has
5 not declined so much that he must be admitted to end-of-life care as in *Ebberts*, a
6 defendant does not need to be terminal to establish extraordinary and compelling reasons.
7 The age-related degradation must be serious, and Bush has established that his health
8 deterioration is serious. His hypertension is uncontrolled, his kidney function is in serious
9 decline, and he only has six teeth. Indeed, the Southern District of Texas found that a 71-
10 year-old defendant who had very similar medical conditions—chronic viral hepatitis C,
11 an enlarged prostate, and stage 3 chronic kidney disease—met the age-related definition
12 of extraordinary and compelling reasons. *United States v. Reece*, Cr. No. H-94-103-8,
13 2020 WL 1659854, at *1 (S.D. Tex. March 27, 2020). Bush has met his burden in
14 establishing that he is experiencing a serious deterioration in health due to the aging
15 process, and the Court thus finds that he has extraordinary and compelling circumstances
16 to warrant compassionate release.

17 **B. Public Safety**

18 Once a defendant has established that extraordinary and compelling reasons exist
19 to warrant release or a reduction in sentence, the defendant must also show that they no
20 longer present a danger to the safety of any other person or to the community. USSG
21 § 1B1.13(2). In making this determination, the Court looks to the nature and
22 circumstances of Bush's underlying offense, the weight of evidence against him, his

1 history and characteristics, and the nature and seriousness of the danger his release would
2 pose to any person or the community. *See* 18 U.S.C. § 3142(g).

3 Bush argues that he does not pose a danger to the community, pointing to the fact
4 that he has had no infractions while in BOP custody. The Government concedes that,
5 given Bush's "age . . . , lack of prior criminal history, and the prison term he has served
6 to date, it seems unlikely that, if released, Bush would again orchestrate a large-scale
7 Ponzi scheme." Sealed Dkt. 146 at 19. The Government does note that there is still a
8 likelihood that Bush could again inflict financial harm on those with whom he comes into
9 contact. But Bush's behavior while in BOP custody has been exemplary, and the United
10 States Probation Office concluded that Bush's currently release plan minimizes any
11 specific risk of danger. The Court thus agrees that Bush does not pose a danger to the
12 safety of any other person or to the community.

13 **C. 18 U.S.C. § 3553(a) Factors**

14 "Having found that that [the defendant's] age and health constitute extraordinary
15 and compelling reasons warranting compassionate release and that he poses no danger to
16 others or to the community, the Court must now consider the factors set forth in 18
17 U.S.C. § 3553(a)." *United States v. Cosgrove*, CR15-230-RSM, 2020 WL 1875509, at *4
18 (W.D. Wash. Apr. 15, 2020) (citing 18 U.S.C. § 3582(c)(1)(A); USSG § 1B1.13). The
19 relevant factors include (i) "the nature and circumstances of the offense and the history
20 and characteristics of the defendant"; (ii) the need for the sentence imposed to reflect the
21 seriousness of the offense, to promote respect for the law, and to provide just punishment
22 for the offense; to adequately deter criminal conduct; to protect the public from further

1 crimes of the defendant; and to provide the defendant with needed educational or
2 vocational training, medical care, or other correctional treatment in the most effective
3 manner; (iii) “the need to avoid unwarranted sentence disparities among defendants with
4 similar records who have been found guilty of similar conduct”; (iv) the sentencing
5 guidelines; and (iv) “the need to provide restitution to any victims of the offense.” 18
6 U.S.C. § 3553(a).

7 The Court applies the § 3553(a) factors in considering a defendant’s sentence, and
8 the Court’s consideration of these factors has changed little since Bush’s sentencing.
9 Indeed, the majority of factors weigh against compassionate release. For example, Bush’s
10 underlying crime was extremely serious and financially harmed many victims. On the
11 other hand, the Court finds that the factor relating to the “need for just punishment” has
12 dramatically shifted since sentencing. The lock-down measures that prisons across the
13 country like Federal Correction Institution Lompoc, where Bush is currently housed,
14 have undergone to mitigate the spread of the pandemic have made confinement much
15 more punitive than was contemplated at sentencing. All visitations have been suspended
16 at FCI Lompoc,² and BOP programs have stopped, except for those required by law.³
17 This factor has much greater weight when balancing it with the other factors. After
18 considering all the factors, the Court concludes that Bush has established an entitlement
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20 ² Federal Bureau of Prisons, *FCI Lompoc*, <https://www.bop.gov/locations/institutions/lof/>
21 (last visited Dec. 18, 2020).

22 ³ Federal Bureau of Prisons, *BOP Modified Operations*,
https://www.bop.gov/coronavirus/covid19_status.jsp (last updated Nov. 25, 2020).

1 to warrant a reduction of his sentence from imprisonment at FCI Lompoc. Under 18
2 U.S.C. 3582(c)(1)(A), if the Court determines that a reduction in sentence is appropriate,
3 the Court may “impose a term of . . . supervised release with or without conditions that
4 does not exceed the unserved portion of the original term of imprisonment.” Pursuant to
5 this authority, the Court reduces the Defendant’s term of imprisonment to time served.

6 **III. ORDER**

7 Therefore, it is hereby **ORDERED** that Bush’s motion for compassionate release,
8 Dkt. 138, is **GRANTED** as follows:

- 9 1) Bush’s term of imprisonment imposed is reduced to time served, and the
10 remaining unserved portion of Bush’s term shall be served on supervised
11 release, *see* 18 U.S.C. § 3582(c)(1)(A), followed by the previously imposed
12 three-year period of supervised release;
- 13 2) Bush shall be released from the custody of the BOP fourteen days after the
14 entry of this Order to his approved release address in the Western District of
15 North Carolina;
- 16 3) Bush shall comply with all the other terms and conditions of supervised release
17 set out in the original sentence and judgment dated March 20, 2009, Dkt. 98;
18 and

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1 4) Bush shall contact the United States Probation Office in Seattle and/or the
2 Western District of North Carolina within 24 hours of his release and follow its
3 instructions.

4 Dated this 14th day of January, 2021.

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7 BENJAMIN H. SETTLE
United States District Judge
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